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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

J. WILTON HUNT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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J. Wilton Hunt, by his attorneys, petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

QUESTIONS PRESENTED

1. Whether the government can introduce unreliable and generally inadmissible hearsay evidence concerning an accused's character simply because he has asserted an entrapment defense.

2. Whether the government can introduce unreliable and generally inadmissible hearsay evidence concerning an accused's character simply because in pre-trial motions he challenged on due process grounds the conduct of the law enforcement officials during the investigation stage.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 749 F.2d 1078, (4th Cir. 1984). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

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STATEMENT OF THE CASE

In 1980, petitioner was an elected judge sitting on the District Court bench for the 13th Judicial District of North Carolina. His jurisdiction was primarily over misdemeanor cases and traffic offenses. The prosecution eventually brought against petitioner stemmed from an undercover investigation of corruption in Columbus

County, one of the counties where petitioners presided. This investigation, conducted by the Federal Bureau of Investigation and known by the acronym "Colcor," lasted until mid-1982, and culminated in the indictments of several public officials, including petitioner.

The evidence at trial showed that Federal Bureau of Investigation agents went into Columbus County in undercover capacities, passing themselves off as members of organized crime. Petitioner's name first came to the agents' attention through an FBI informant, Joe Moody. In late August, 1980, Moody had two assault charges scheduled for trial in front of petitioner. A few weeks before trial Moody approached one of the agents and told him that another person (Danny Edwards) had said petitioner was available for protection money and might be willing to fix Moody's case. Edwards, according to Moody, said that for $300 he could "deliver" petitioner.

The agent who received that information had never to that point heard of petitioner in the year that the "Colcor" investigation had been ongoing. And, as it turned out, the allegation against Judge Hunt proved baseless, for Edwards was given $300 of FBI money by Moody and then failed to produce petitioner. The FBI agent acknowledged that the whole episode appeared to be nothing more than a scam or flimflam on Edward's part.

A few weeks after Edwards' flimflam, Joe Moody – who had since gone to court and been convicted of both charges, placed on probation and "chewed out" by Judge Hunt – came back to Agent Redden with the assertion that another Whiteville resident, James Carroll, said he could "deliver" Judge Hunt. Carroll was to become a valuable, *albeit* unwitting agent of the FBI, "Colcor" investigation, eventually participating and inducing others to participate in marijuana smuggling and sale cases,

hashish smuggling, cocaine deals, counterfeit money deals, arson, tax frauds, receiving stolen property, bribery, hijacking, stealing cars, gambling, and laundering money of drug dealers through banks.

Although Carroll would subsequently acknowledge at trial that he hardly knew petitioner, he told the agents that he knew petitioenr quite well, and said that petitioner would be available for protection payments.

The agents placed considerable pressure on Carroll to gain an introduction to petitioner, and Carroll eventually set up the meeting. When the agents first met petitioner they presented themselves as simply individuals interested in buying a local restaurant and turning it into a steak house. No bribes or protection payments were discussed, and after the meeting the agent came away with the impression that petitioner was not corrupt.

Nonetheless, the agents, both directly and through Carroll, made several more approaches at petitioner, and eventually he accepted $1,000 in cash, calling it a campaign contribution. Thereafter, on several other occasions over the next year, petitioner accepted cash totalling $4,500.00. On two occasions the agents requested that petitioner give lenient treatment to supposed members of their organization who had pending traffic matters on his calendar, and those matters were, in fact, deposed of favorably to the undercover agents.

On July 22, 1982, an indictment was returned against petitioner, charging him in Count I with conspiring to violate §1962(a) of the Racketter Influenced and Corrupt Organizations statute (Title 18 U.S. Code §§1961-1968) in that he conducted the affairs of an enterprise — his judgeship — through a pattern of racketeering activity (accep-

ting five bribes), and in Count II with usage of a telephone to facilitate an interstate bet (Title 18 U.S. Code §1952(a)). The latter count involved a separate instance where, after several importunings, the agents got petitioner to give them the phone numbers of a bookie that they could place football bets with.

Prior to trial, petitioner filed a motion to dismiss the indictment on due process grounds, arguing that the FBI's conduct of persistent pursuit of petitioner notwithstanding the fact that he had no history of corruption and in the face of his initial refusals to accept money was outrageous. That motion was denied.

At trial petitioner raised an entrapment defense. To show that he had no predisposition to commit crime, the defense called a long series of witnesses, including fellow judges, former prosecutors and members of the bar, to testify about petitioner's integrity and excellent character. None of these witnesses had ever heard even a whisper of corruption associated with petitioner.

The government, over defense objection, attempted to prove that petitioner had predisposition by introducing third and fourth-hand hearsay. This evidence consisted of statements from generally unnamed sources that petitioner "associated with criminal element" in his hometown and "had built a fairly good gun collection" from confiscated firearms. Another agent was permitted to testify about hearing a story that petitioner had once fixed a firearms charges against a cousin of his, and further that a prison inmate had alleged that petitioner was involved in drug transactions nd had purchased an automatic weapon. None of the informants in the chain of transmitting this information actually testified at petitioner's trial, and the government made no effort to show their unavailability.

After several hours of jury deliberation, during which the jury asked to be reinstructed on predisposition, petitioner was convicted on both counts, and sentenced to a total of 14 years imprisonment. On appeal to the Fourth Circuit, petitioner contended that his Confrontation rights were violated by the government's introduction into evidence of the series of unreliable, unsworn, uncross-examined and extremely inflammatory hearsay statement.

On November 28, 1984, a divided panel of the Court of Appeals, over a strong dissent by Circuit Judge Sprouse, affirmed petitioner's convictions. The majority, consisting of one member of the court plus a Federal District Judge sitting by designation, held that where the defendant raises a due process challenge to the conduct of law enforcement officials during the investigative phase of the case, then the government is entitled to introduce at trial hearsay evidence concerning the defendant's character that would otherwise be inadmissible.

Judge Sprouse, in dissent, pointed out that the majority's position was at odds with every other Circuit that had addressed the issue of the admissibility of hearsay in entrapment cases. He also noted that by holding that a defendant's due process challenge to his prosecution "opened the door" to otherwise inadmissible hearsay the majority in effect required petitioner "to choose between an entrapment defense and a constitutional due process claim," slip op. at 42, a Hobson's choice flatly at odds with this Court's teaching in *Simmons* v. *United States,* 390 U.S. 377 (1968).

On February 4, 1985, the Fourth Circuit Court of Appeals denied petitioner's petition for rehearing and/or rehearing *en banc.*

REASONS FOR GRANTING THE WRIT

This case presents two important and interrelated questions that are presently unanswered by the previous decisions of this Court. The first is the extent to which the government, consistent with the Confrontation Clause, can introduce unreliable evidence concerning a defendant's predisposition and character to rebut his entrapment defense and prove his predisposition.

While this Court has not directly spoken on this issue, six other Circuits have, and each has flatly rejected the notion that simply because a defendant has interposed an entrapment defense otherwise inadmissible hearsay evidence can be introduced by the government.

Assuming that this Court, consistent with its own Confrontation Clause decisions, reaches that same conclusion, then the second issue that deserves this Court's attention is whether the defense "opens the door" to unreliable and inflammatory hearsay by raising in pretrial motions due process challenges to the indictment based on alleged law enforcement misconduct during the investigative phase.

1. The majority opinion below, by permitting the introduction of inflammatory and unreliable hearsay in a criminal trial, has diluted the Sixth Amendment rights that this Court and several Circuits have held to be guaranteed to an accused.

Our legal profession adamantly believes that cross-examination, the primary interest secured by the Confrontation Clause, in the words of Chief Justice Burger, is "the principal means by which the believability of a witness and the truth of this testimony are tested." *Davis* v. *Alaska,* 415 U.S. 308, 316 (1974). A term earlier this Court observed:

> The right of cross-examination is more than a desirable rule of trial procedure. It is a implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process. . . ." It is, indeed, "an essential and fundamental requirement for the kind of a fair trial which is this country's constitutional goal."

Chambers v. *Mississippi,* 410 U.S. 284, 295 (1973).

To insure these values, this Court has set some very rigid limitations as to when the government can introduce evidence in hearsay form against an accused that he can't fully confront. See *Ohio* v. *Roberts,* 448 U.S. 56 (1980); *Mancusi* v. *Stubbs,* 408 U.S. 204 (1972); *Dutton* v. *Evans,* 400 U.S. 74 (1970). In basic terms, to bypass the Confrontation Clause, the government must show that the original declarant of the evidence is unavailable at the time of trial and, further, that the evidence has "indicia" of reliability or trustworthiness:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishers a rule of necessity. In the usual case (excluding cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi* v. *Stubbs,* 408 U.S. 204 (1972); *Barber* v. *Page,* 390 U.S. 719 (1968). See also *Motes* v. *United States,* 178 U.S. 458 (1900); *California* v. *Green,* 399 U.S., at 161-162, 165, 167, n.16.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underly-

> ing purpose to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." *Snyder* v. *Massachusetts,* 291 U.S. at 107.

Ohio v. *Roberts, supra,* 448 U.S. at 65.

At petitioner's trial, the government made no effort to show that the original sources – if any – of the inflammatory evidence unavailable. Nor did the majority opinion below purport to find otherwise.

In virtually every Confrontation Clause case, the government's inability to establish the "unavailability" of the witness – and thus the necessity of introducing the out-of-court statement – ends the discussion, for "unavailability" *vel non* is the first of two hurdles the government must clear. Even if, for the sake of discussion, the government were permitted to sidestep the first hurdle, it must still establish that the hearsay statements at issue had some "indicia of reliability." In the words of *Mancusi* v. *Stubbs,* 408 U.S. 204, 213 (1972):

> The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before a jury though there is no confrontation," *Dutton* v. *Evans,* and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California* v. *Green, supra,* at 161. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these indicia of reliability.

The government cannot demonstrate the reliability or trustworthiness of any of the out-of-court statements. One accepted means for showing reliability is proof that the "evidence falls within a firmly rooted hearsay exception." *Ohio* v. *Roberts, supra,* 448 U.S. at 66 (dictum). Pigeonholing the evidence into a recognized hearsay exception does not automaticallay satisfy the Confrontation Clause, *see California* v. *Green,* 399 U.S. 149, 155-156 (1970), but it at least gives the government a headstart. The out-of-court statements here fail even that rudimentary test.

To be sure, once petitioner elected to raise the defense of entrapment, he opened himself up to a "searching inquiry" as to his criminal predisposition. *See Sorrells* v. *United States,* 287 U.S. 435, 451 (1932). That doesn't mean, however, that the rules of evidence went flying out the window. Petitioner's evidence of no predisposition was in reality simply evidence of good character (or, more accurately, evidence of a good reputation). His right to introduce evidence of good character to show the unlikelihood of him committing the offense goes all the way back to *Michelson* v. *United States,* 335 U.S. 469 (1948), which, coincidentally enough, was a bribery case where the accused raised the defense of entrapment. Merely because good character evidence is introduced by the accused, however, doesn't mean that the government can respond to it with "irresponsible gossip, innuendo and smear." *Michelson* v. *United States, supra,* 335 at 480. Once the defense has introduced evidence of good character, the government can, of course, cross-examine those witnesses about specific — and proveable — acts by the accused that are at odds with that character trait. 3A Wigmore, Evidence §888 at 913-2001 (Chadbourn ed. 1970); *see also* Federal Rules of Evidence 40(a). And, of course, the government may call its own witnesses to tes-

tify – if they have a sufficient basis – as to what the defendant's real reputation is. *See* Fed. R. Evid. 404(a) (1), 803(21). What the government cannot do, however, is use the excuse of a defense of entrapment to introduce information "entirely based upon hearsay, suspicion, unverified sources and unreliable innuendo" that is otherwise inadmissible.

Every other Circuit which has considered this issue has held that hearsay evidence of the nature used at petitioner's trial cannot be used as proof of predisposition. *See United States* v. *Webster,* 649 F.2d 346 (5th Cir. 1981) (*en banc*); *United States* v. *McClain,* 531 F.2d 431 (9th Cir.), *cert. denied,* 429 U.S. 835 (1976); *United States* v. *Ambrose,* 483 F.2d 742 (6th Cir. 1973); *United States* v. *Cantazaro,* 407 F.2d 988 (3rd Cir. 1969); *Whiting* v. *United States,* 296 F.2d 512 (1st Cir. 1961); *Hansford* v. *United States,* 303 F.2d 219 (D.C. Cir. 1962).

We submit that the majority opinion below is in clear conflict with those Circuit, as well as with the Confrontation Clause cases from this Court.

2. There is a strong suggestion in the majority opinion that the reason it upheld the use of otherwise inadmissible and inflammatory hearsay evidence at petitioner's trial is because petitioner had made a due process challenge to the conduct of the investigative officers. Certainly dissenting Judge Sprouse read the majority opinion that way:

> "The effect of the majority's opinion is to require [petitioner] to choose between an entrapment defense and a constitutional due process claim."

Slip opinion at 42.

If, as it appears, that is a proper interpretation of the majority holding, then it cannot be reconciled with *Simmons* v. *United States,* 390 U.S. 377 (1968). The Seventh Circuit Court of Appeals in that case had upheld the admission at trial against an accused of testimony given by him upon his unsuccessful pre-trial motion to suppress certain evidence on Fourth Amendment grounds. Six members of this Court, however, concluded that:

> [t]he rule adopted by the courts below does not merely impose upon a defendant a condition which may deter him from asserting a Fourth Amendment objection — it imposes a condition of a kind to which this Court has always been peculiarly sensitive."

Simmons v. *United States, supra,* 390 U.S. at 393. The Court reversed the petitioner's conviction, holding that it was "intolerable that one's constitutional right should have been surrendered in order to assert another." *Simmons* v. *United States, supra,* 390 U.S. at 394.

That, of course, is precisely what occurred at petitioner's trial, and what has been sanctioned by the majority opinion below. Because the majority's holding so squarely clashes with this Court's holding in *Simmons* v. *United States, supra,* it provides a separate reason for the granting of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for A Writ of Certiorari has been served by mail upon the Honorable Rex E. Lee, Solicitor General, Department of Jsutice, Washington, D.C. 20530, and Sidney M. Glazer, Esquire, Appellate Section, Criminal Division, U.S. Department of Justice, P.O. Box 899, Washington, D.C. 20044; J. Douglas McCullough, Esquire, 1st Assistant United States Attorney, P.O. Box 26897, Raleigh, North Carolina 27611.

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